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SUPREME COURT
STATE OF WASHINGTON

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No. 79106-6

SUPREME COURT
OF THE STATE OF WASHINGTON

SIOBHAN RICCI,

Appellant,

v.

STEVEN GARY and JANE DOE GARY, and the marital community
composed thereof; ALMA STANFORD and JOHN DOE STANFORD,
and the marital community composed thereof,

Respondents.

APPELLANT'S ANSWER TO WASHINGTON DEFENSE
TRIAL LAWYERS' BRIEF

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**ANSWER TO WASHINGTON DEFENSE TRIAL
LAWYERS' AMICUS CURIAE BRIEF**

The WDTL incorrectly asserts that Ricci's submission of Stuart Greenberg's deposition testimony was late. Because there were two motions presented to the trial court, the procedural context may cause some confusion.

The following time line may relieve any confusion:

3/25/05	Gary Motion for Summary Judgement, CP 9-42
4/12/05	Ricci Answer to Motion for Summary Judgement, CP 243-260
4/14/05	Gary Motion to Strike, CP 277-84
4/18/05	Gary Reply on Motion for Summary Judgement
4/20/05	Ricci Answer to Motion to Strike, CP 345-58 and Luppert Declaration with Greenberg Deposition Excerpts
4/21/05	Gary Reply on Motion to Strike CP 4/21/05
4/22/05	Hearing

Gary filed two separate motions, scheduling their hearing on the same day. The deadlines for filing the summary judgement motion is governed by CR 56. The deadlines for filing the motion to strike are governed by King County Local Rule 7(b)(3). (KCLR). KCLR 7(b)(3) provides that opposing papers shall be filed and served "no later than 12:00 noon two court days before the date the motion is to be considered." Ricci's answer to Gary's motion to strike, including the excerpts from Stuart Greenberg's deposition,

was timely filed two court days before the motion was to be considered.

Gary's motion for summary judgement did not challenge plaintiff's expert's qualifications, but contended only that plaintiff had no expert testimony to support her claims. Ricci answered that an expert, psychologist Stuart Greenberg, Ph.D., did support her claims and submitted Greenberg's report and curriculum vitae in support of her answer. Until Gary subsequently moved to strike Greenberg's report, no issue had been raised that Greenberg and Gary practiced in such uniquely specialized fields that one required particular expertise to opine whether the sexualization of a therapeutic relationship violated the standard of care of another mental health professional. Further, the overlapping statutory definitions of psychologist and mental health counselor, RCW 18.83.020(1) and RCW 18.225.010(8) respectively, appeared to have made any more particularized distinction between psychologists and mental health counselors unnecessary in the context of the case. Gary's having first raised the issue of Greenberg's qualifications in a motion to strike, Ricci was entitled to answer.

The trial judge expressly declined to review the excerpts from Greenberg's deposition, submitted with Ricci's answer to the motion to strike, before granting Gary's motion to strike. CP 452-54. It is less apparent, and WDTL seems to be unaware, that the trial judge did not review the answer itself, including the legal authority and argument, before ruling on Gary's

motion to strike. Ricci's motion for reconsideration asked the trial judge to consider her timely filed answer to the motion to strike which the trial court apparently overlooked before granting Gary's motion to strike. CP 455, 457. The trial court's Order authorizing a response to Ricci's motion for reconsideration confirms that the trial court had overlooked the answer and its legal authority before granting Gary's motion to strike. RP 470 ("At the time the court ruled on the motion to strike, the court was not aware of the existence of the legal memorandum."). Ricci's motion for reconsideration did not ask the trial court to review Greenberg's deposition testimony as "new evidence," contrary to WDTL's assertion. Greenberg's deposition testimony had been submitted with the answer to Gary's motion to strike. Ricci's motion for reconsideration asked only that the trial court to reconsider in light of the legal arguments which the trial court had overlooked.

Ricci continues to assert that Greenberg's report and CV submitted in answer to Gary's motion for summary judgment were sufficient to conclude that he was competent to express an opinion regarding the standard of care applicable to Gary in the context of their overlapping practices. Should, however, this Court determine that Greenberg's competency was not sufficiently established by his CV, Ricci asks the Court to adopt the leniency standard urged by amicus Washington State Trial Lawyers Foundation.

If the Court reviews the Greenberg testimony submitted in response

to Gary's motion to strike, his competency will be confirmed. Specifically, Dr. Greenberg testified that he is a clinical psychologist, that he was trained as a clinical psychologist, and that he is registered with the state as a psychologist. Greenberg dep pp 32, 68, CP 376, 379. He testified that his training overlaps with that received by Mr. Gary, including taking courses in family systems therapy, the defendants' field of practice. Greenberg dep p 32-33, CP 375-76. He stated that Mr. Gary's degree in applied clinical psychology encompasses a major part of his own training although his degree is a doctor of philosophy, whereas Mr. Gary's is a masters degree. Greenberg dep pp 69-70, CP 380. Dr. Greenberg also testified that like defendants, he has used family systems therapy in his clinical practice. Greenberg dep pp 32-33, CP 375 - 376.

Dr. Greenberg testified that he had reviewed the depositions of Alma Stanford, Steven Gary and volume 1 of Siobhan Ricci. Greenberg dep pp 8-9, CP 370-71. Dr. Greenberg reviewed the literature on the subject or was already familiar with it, as he referenced the literature several times during his deposition. Greenberg dep pp 36, 38, 64, 74., CP 376, 377, 378, 381.

Dr. Greenberg also testified that he is qualified to express opinions regarding the standard of care for a licensed mental health counselor in Washington because he has read the practice and ethics codes and the regulations for mental health counselors, and "because what counselors are

trained to do is part of the same thing that psychologists and psychiatrists are trained to do." Greenberg dep p 73, CP 381.

If Greenberg's deposition testimony is regarded as a late supplement to an opposition to summary judgement rather than a timely response to a motion to strike, the moving party has not been prejudiced, and its late filing was a result of a good faith belief that the qualifications presented in his report and CV demonstrated that the standards of care were necessarily the same for professionals when providing the same kind of counseling service to clients with the same kinds of emotional problems.

Respectfully submitted this October 8, 2007



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